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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HERMAN CASTILLO FERMAN, Plaintiff and Appellant, v. FERRIS PAINTING, INC., Defendant and Respondent.	B291666 Los Angeles County Super. Ct. No. BC643414

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed in part, reversed in part.

Lyon Law, Geoffrey C. Lyon, Alexis R. Sadakane and Stephen Young for Plaintiff and Appellant.

Andrews Lagasse Branch + Bell, Margaret C. Bell and Kathryn K. Hoyt for Defendant and Respondent.

Plaintiff sued his former employer, defendant Ferris Painting, Inc. (Ferris), for retaliation under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (h)) and violation of the workplace whistleblower statute (Lab. Code, § 1102.5). He claimed Ferris terminated his employment because he complained about sexual orientation harassment and reported statutory violations to the United States Equal Employment Opportunity Commission (EEOC). Ferris moved for summary adjudication. It argued plaintiff was fired because a customer complained about an argument plaintiff had with his harasser, and it maintained there was no evidence to establish a retaliatory motive. Plaintiff responded with evidence showing Ferris terminated his employment one day after he complained about the harassment, and, upon terminating him, Ferris's owner remarked that it was "very difficult to work with homosexuals [and] that it was better to work with women." As for the whistleblower claim, plaintiff failed to rebut evidence showing Ferris was unaware of his EEOC complaint when it terminated his employment. The trial court granted summary adjudication. We reverse the summary adjudication of the retaliation claim and affirm the judgment in all other respects.[1]

FACTS AND PROCEDURAL BACKGROUND

"Because this case comes before us after the trial court granted a motion for summary [adjudication], we take the facts

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[1] Plaintiff asserted several other employment discrimination claims, all of which were resolved by summary adjudication or a jury verdict in favor of Ferris. Although his notice of appeal purports to challenge the entire judgment, plaintiff's appellate briefs argue for reversal of only the summary adjudication rulings on the retaliation and whistleblower claims.

from the record that was before the trial court when it ruled on that motion. [Citation.] ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).)

1. *The Parties*

Ferris is a small paint contracting business. Gregory Lewis is the company's owner and president. Ferris employs crews of three to five painters who are supervised by a foreman at each jobsite. The foreman reports to Lewis each day about the status of ongoing projects and any problems at the jobsite. Lewis has exclusive authority over hiring and firing decisions.

Plaintiff is from El Salvador. He speaks Spanish and cannot speak English. He identifies as bisexual, although employees at Ferris believed he was homosexual.

Ferris initially employed plaintiff as a painter from 2011 to 2013. During this period, Lewis learned of plaintiff's sexual orientation. In 2015, Lewis re-hired plaintiff.

During the relevant period, Ferris employed Carlos Cruz as a painter and foreman for some projects. Among other responsibilities, Cruz reported to Lewis on crew attendance and progress at the jobsite.

Ferris also employed Napoleon Castillo as a painter during the relevant period.

2. ***Plaintiff's Termination***

Between June and August 2016, plaintiff was assigned to a painting crew with Cruz and Castillo. Cruz served as the crew's foreman.

The first time plaintiff spoke with Castillo, Castillo told plaintiff he had been a "gigolo," or male prostitute, in the Dominican Republic. Castillo explained that he met his wife through his prostitution work and he described a sexual act he performed on her. Plaintiff was offended by Castillo's description and complained to Cruz that Castillo was discussing sexual matters in graphic detail. Cruz laughed and told plaintiff, "It's okay, brother." Plaintiff did not report the conversation to Lewis.

The same week, plaintiff witnessed Castillo yelling sexually suggestive remarks at female pedestrians who passed by the jobsite. When plaintiff confronted Castillo about the conduct, Castillo began calling plaintiff "maricon," a derogatory term for homosexuals in Spanish. When plaintiff reported the harassment to Cruz, Castillo interjected, "This guy is a maricon, that's why he's complaining to you about what is happening . . . with the wom[en]."

Later that month, Castillo made despicable comments to plaintiff and Cruz about a mass shooting at a gay nightclub in Orlando. Castillo told them it was "good" that the shooter had done "that to kill all the gays and to exterminate them because they were like cockroaches [to] him." He described a "machete" that he kept in his truck when he was a prostitute, explaining that "whenever a 'maricon' would come up and offer to pay him," he would threaten "to cut them up into pieces." Cruz did not "do anything" about Castillo's comments. Plaintiff did not report

the incident to Lewis and Castillo continued to refer to plaintiff as "maricon."

On August 17, 2016, Cruz informed Lewis that there had been an altercation between plaintiff and Castillo at the crew's jobsite in Pasadena. Plaintiff also contacted Lewis that evening to report there had been a "problem" between him and Castillo. Lewis told plaintiff he would be at the Pasadena jobsite in the morning to investigate the incident.

The following morning, August 18, 2016, plaintiff sent Lewis a text message stating he did "not feel good to work today" because there had been "too much harassment from [Castillo]." Lewis asked plaintiff to provide a statement describing the alleged harassment. With the help of a friend who translated his statement into English, plaintiff sent a series of text messages to Lewis a half hour later:

> "[Castillo] has been harassing me at work calling me gay in a derogatory manner, in Spanish. [¶] He calls me 'fagot' [*sic*] . . . every time [he] passe[s] by me. [¶] He's been doing this for approximately the past five weeks and I've complained to [Cruz] about this at least three times, but [Cruz] has done nothing about it. [¶] [Cruz] just says that I kid around with [Castillo] but that's not true."

Lewis responded: "Ok I understand what you are saying. I just wish you had told me when I saw you on the job these past weeks. I will call you later." Plaintiff responded: "I said I was ok because I was hoping to fix this problem on my own."

When Lewis arrived at the Pasadena jobsite, he spoke with Cruz, Castillo, and another crewmember, Mario Hernandez. The

crewmembers informed Lewis that plaintiff had become very aggressive, tried to physically fight Castillo, screamed at Castillo, challenged Castillo with "chest bumps," slammed the door of a work van, and waived a metal tool at Castillo.

Lewis asked the crewmembers about plaintiff's harassment complaint. They reported plaintiff and Castillo occasionally engaged in name-calling and plaintiff did not seem bothered by the names. They said name-calling was the way plaintiff and Castillo interacted with each other. Lewis instructed the workers not to make derogatory statements toward another employee and, if it happened again, to report it to him.

Later that day, Lewis received a phone call from someone identifying herself as a homeowners' association board member for the Pasadena jobsite. The caller said she heard a commotion coming from the jobsite and looked down into the courtyard to see a man fitting plaintiff's description yelling at another painter. The caller described the conduct as "inappropriate" and "troublesome."

According to Lewis, he became concerned about the "challenge, hostility, and aggression" plaintiff directed at Castillo. He also was concerned about "losing customers" and that the incident could "cost [him] [his] business."

The next day, August 19, 2016, Lewis met with plaintiff and plaintiff's friend who served as a translator. Lewis presented plaintiff with his final paycheck, a separation form, and a letter explaining the grounds for plaintiff's termination. He told plaintiff he could not tolerate an employee becoming aggressive and yelling at another employee on a jobsite, and he was

concerned about the impact that behavior would have on Ferris's clients.[2]

The separation form indicated plaintiff was "resigning from the company voluntarily" and "resigning any rights . . . to file a lawsuit." When plaintiff refused to sign it, Lewis threw the paycheck in plaintiff's face. Plaintiff walked away, and Lewis told plaintiff's friend to pick up the check. The friend refused, explaining the check was not made out to him. Lewis then remarked that it was "very difficult to work with homosexuals [and] that it was better to work with women."

Lewis verbally reprimanded Castillo for the harassment, but he did not terminate Castillo's employment.

3. *Summary Adjudication*

Plaintiff sued Ferris for workplace harassment, sexual orientation discrimination, retaliation in violation of FEHA, violation of the Labor Code whistleblower statute, and several other related employment discrimination claims. With respect to the whistleblower claim, plaintiff alleged that he reported Ferris's violations to the EEOC, and that Ferris subjected him to adverse employment actions in retaliation.

Ferris moved for summary judgment. It argued plaintiff could not establish a prima facie case for discrimination or

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[2] The letter similarly explained that Lewis had received a complaint from a board member at the Pasadena jobsite, who was "very disappointed" with Lewis and Ferris when she witnessed plaintiff yelling at another painter on the property. It explained the incident made the company "look very bad to our customers and also to the property manager," who would be unlikely to give Ferris additional work after hearing about an employee "acting like this on one of their properties."

retaliation, because there was no evidence of a "causal connection" between his sexual orientation, or his complaints about harassment, and his termination. Additionally, Ferris argued plaintiff's aggressive behavior toward Castillo, coupled with the customer complaint, was the actual nondiscriminatory reason for plaintiff's termination. As for the whistleblower claim, Ferris argued there was no evidence that Lewis knew plaintiff had made a complaint to the EEOC when he terminated plaintiff's employment.

In opposition, plaintiff argued Lewis's remark—that it was "very difficult to work with homosexuals [and] that it was better to work with women"—created a disputed issue of fact regarding his motive for terminating plaintiff. As for retaliation, he argued the claim was "derivative" of his discrimination and harassment claims. And, with respect to the whistleblower claim, plaintiff argued the temporal proximity of his complaint and termination were sufficient to raise a triable issue of fact.

The trial court denied summary adjudication of the discrimination and harassment claims, but granted summary adjudication of the retaliation and whistleblower claims. With respect to the discrimination claim, the court reasoned Lewis's remark about the difficulty of working with homosexuals constituted direct evidence of discriminatory animus and created a triable issue as to whether the altercation with Castillo was the real reason for plaintiff's termination. However, with respect to retaliation, the court found Lewis's stated reason for terminating plaintiff was credible, and plaintiff's failure to present any evidence of retaliatory animus, other than temporal proximity, entitled Ferris to judgment as a matter of law. As for the whistleblower claim, the court emphasized that the complaint

alleged plaintiff was terminated for reporting violations to the EEOC, and there was no evidence that Lewis knew of such a complaint when he terminated plaintiff.

The court entered judgment on the remaining claims following a jury trial and defense verdict. Plaintiff appealed the judgment, but challenges only the summary adjudication rulings on his retaliation and whistleblower claims.

DISCUSSION

1. *Standard of Review and the* McDonnell Douglas *Test for Summary Adjudication of Employment Claims*

On appeal from a summary adjudication, "we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) We make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

A defendant is entitled to summary adjudication upon a showing that a plaintiff's cause of action has no merit. (Code Civ. Proc., § 437c, subds. (a) & (f)(1).) The defendant meets this burden with respect to each cause of action by establishing undisputed facts that negate one or more elements of the claim or state a complete defense to the cause of action. (*Id.*, subd. (p)(2); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists

as to the cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

In the employment discrimination context, case law has refined this burden-shifting analysis to incorporate the three-stage *McDonnell Douglas* test used to try federal discrimination claims.[3] (See *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004–1005.) Under the *McDonnell Douglas* test, the plaintiff bears the initial burden to establish a prima facie case of discrimination; if the plaintiff is successful, the burden shifts to the employer to offer a legitimate nondiscriminatory reason for its actions; and, if the employer produces evidence of a legitimate reason, the burden shifts back to the plaintiff to show the employer's reason was a pretext to mask an illegal motive. (*Guz*, *supra*, 24 Cal.4th at pp. 354–356; *Yanowitz, supra,* 36 Cal.4th at p. 1042; *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67–68 (*Morgan*).) The *McDonnell Douglas* test "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows

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[3] "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.] In particular, California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Guz, supra,* 24 Cal.4th at p. 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.)

discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz*, at p. 354.)

" '[T]he plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ' [Citation.] Circumstantial evidence of ' "prete[xt]" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis. [Citation.] With direct evidence of pretext, ' "a triable issue as to the actual motivation of the employer is created even if the evidence is [only slight]." ' " (*Morgan, supra,* 88 Cal.App.4th at pp. 68–69.)

2. *The Evidence Raises a Triable Issue of Fact as to Whether Retaliation Motivated the Discharge Decision*

FEHA makes it unlawful for any employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) To establish a claim for retaliation, the plaintiff must show he or she engaged in a "protected activity," the employer subjected the employee to an adverse employment action, and a causal link exists between the protected activity and the employer's action. (*Yanowitz, supra,* 36 Cal.4th at p. 1042.) Ferris contends, and the trial court concluded, plaintiff could not establish the causal link element of his retaliation claim.

When an employer moves for summary adjudication by challenging the causal link element of a FEHA claim, the employee must show "triable issues of material fact exist [as to] whether discrimination was a substantial motivating reason for the employer's adverse employment action." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1186 (*Husman*); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215, 232 ["there must be a causal link between the employer's consideration of a protected characteristic and the action taken by the employer" and a plaintiff must demonstrate "discrimination was a *substantial* motivating factor, rather than simply a motivating factor"].) "A 'substantial motivating reason' is a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action]." (CACI No. 2507, italics omitted; see *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1320–1321 [explaining Judicial Council amended CACI No. 2507 to conform to Supreme Court's decision in *Harris*].)

In opposing summary adjudication of his retaliation claim, plaintiff argued the claim was "derivative of [his] claims for harassment and discrimination." Although not artfully stated, we understand this argument to mean the same evidence that supported plaintiff's discrimination and harassment claims also supported his retaliation claim, including its causal link element. Plaintiff's responses to Ferris's separate statement of undisputed facts confirms this intention.

To demonstrate no triable issue existed regarding the causal link element of the retaliation claim, Ferris advanced, as an undisputed fact, Lewis's assertion that there was "no other motivation for [plaintiff's] termination," other than his "concern[ ] about Plaintiff's violent misconduct at the jobsite, the well-being of his employees, and losing customers for his small business." But plaintiff disputed the assertion, citing evidence showing (1) plaintiff had complained to Lewis about Castillo's sexual orientation harassment (and Cruz's failure to correct it) one day before Lewis terminated plaintiff's employment; (2) despite Castillo's harassment, Lewis did not take adverse employment action against Castillo; and (3) when Lewis terminated plaintiff, he remarked that "it is very difficult to [work] with homosexuals [and] that it was better to work with women."[4] Based on this

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[4] Ferris contends plaintiff made admissions in his separate statement response that preclude him from arguing retaliation was a substantial motivating factor in his termination. Ferris relies specifically upon plaintiff's "Undisputed" responses to the following two separate statements of fact: (1) "Plaintiff testified [at his deposition] that Mr. Lewis never said anything which suggested he was terminating Plaintiff because he had made complaints of sexual orientation harassment;" and (2) "Plaintiff admitted [at his deposition] that, besides the fact he had made a complaint, he [was] not aware of any evidence suggesting his termination was motivated by his complaint."

Notwithstanding these responses, it is clear from plaintiff's other responses (discussed above) that plaintiff was not conceding the causal link issue. And, contrary to Ferris's premise, our appellate courts have repeatedly recognized that a plaintiff's response to a separate statement of undisputed facts is not to be accorded the same effect as a judicial admission. (See *Wright v.*

evidence, plaintiff argued "only a jury can reasonably determine the truth behind why Lewis terminated Plaintiff."

We agree with plaintiff. The same evidence that compelled the trial court to deny summary adjudication of the discrimination claim also presents a triable issue of fact concerning the causal link between plaintiff's opposition to sexual orientation harassment and Lewis's decision to terminate plaintiff's employment. As the trial court recognized with respect to discrimination, Lewis's remark about the difficulty of working with homosexuals, one day after plaintiff's complaint about sexual orientation harassment, is sufficient evidence of pretext to support a finding that the altercation with Castillo and the

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Stang Manufacturing Co. (1997) 54 Cal.App.4th 1218, 1225, fn. 2; *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066–1067; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482, overruled on other grounds in *Riverisland Cold Storage, Inc. v. Fresno–Madera Production Credit Association* (2013) 55 Cal.4th 1169, 1182.) As the *Kirby* court explained: "[A] 'summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence' . . . [¶] . . . When the facts submitted in opposition to a summary judgment motion indicate the existence of a material factual issue, summary judgment should not be entered based on mistaken legal conclusions . . . [or] where the opposing party submits evidence indicating that a mistake was made." (*Kirby,* at pp. 1066–1067; accord, *Wright,* at p. 1225, fn. 2.) In light of plaintiff's responses to Ferris's specific assertions about Lewis's purported nonretaliatory motivation, it is clear that his deposition testimony and "Undisputed" responses were mistakes that cannot, standing alone, establish Ferris's right to judgment as a matter of law.

related customer complaint were not the actual reasons for Lewis's adverse employment decision.[5] Thus, while Ferris

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[5] The trial court characterized the statement as "direct evidence" of pretext, even though an inference is arguably required to conclude Lewis's evident animus motivated the firing decision. (Cf. Evid. Code, § 410 [" 'direct evidence' means evidence that directly proves a fact, without an inference or presumption"]; accord, *Morgan, supra,* 88 Cal.App.4th at p. 67.) To be sure, reported cases have sometimes blurred the distinction between direct and indirect evidence in employment discrimination cases. (See, e.g., *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 816–817 (*Iwekaogwu*) [characterizing supervisor's statements about what conduct he did and did not think constituted racial discrimination as "direct evidence" or retaliatory animus based on inference that supervisor "did not take [plaintiff's] complaints seriously"].) Be that as it may, the distinction makes no difference in this case.

Even if Lewis's remark did not directly establish pretext, plaintiff produced sufficient circumstantial evidence to prove retaliation was a substantial motivating factor in the discharge decision. Plaintiff's complaint about the harassment, coupled with Lewis firing him one day later, establishes a prima facie case of retaliation. (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 91 ["The requisite 'causal link' [element of the prima facie case] may be shown by the temporal relationship between the protected activity and the adverse employment action."].) Under the *McDonnell Douglas* framework, to rebut Ferris's showing of a non-retaliatory reason for the discharge, plaintiff was required to provide substantial evidence that the purported reason was "*either* ' " ' "untrue or pretextual," ' " ' *or* ' " ' "the employer acted with a discriminatory animus," ' " ' *or* ' " ' "a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." ' " ' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 931.) Plaintiff's

certainly proffered ample evidence of a possible legitimate nonretaliatory reason for plaintiff's termination, this evidence of animus is sufficient to raise a triable issue of fact. (See *Husman, supra,* 12 Cal.App.5th at p. 1186.)

Ferris maintains Lewis's remark is insufficient to establish *retaliatory* animus, however. It argues the statement relates to only plaintiff's "sexual orientation and does not provide any evidence, or cause any inference, that Mr. Lewis held a *retaliatory* animus because [plaintiff] brought a complaint." Alternatively, Ferris argues even if the remark had some bearing on Lewis's true motivation, the jury's rejection of plaintiff's discrimination claim at trial demonstrates plaintiff "cannot establish a derivative claim [for retaliation], as a matter of law." We disagree on both counts.

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testimony regarding Lewis's remark satisfied this rebuttal burden. As we explain in greater detail below, when considered in context with plaintiff's complaint about the ongoing sexual orientation harassment he suffered, Lewis's remark about the difficulty of working with homosexuals could support a jury finding that retaliatory animus substantially motivated the discharge decision. (See *Diego,* at pp. 930–932 [evidence that 10-year employee was fired seven days after state licensing division made unannounced inspection of employer, and supervisor's statements suggesting he believed employee made anonymous report to licensing division, were sufficient, "individually and collectively," to support employee's "theory that her discharge was motivated by discrimination rather than insubordination"]; see also *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 354 ["temporal proximity, *together* with the *other* evidence, may be sufficient to establish pretext"].)

Regarding Ferris's latter argument about the subsequent jury verdict, the settled rule mandates that we review the summary adjudication ruling based on "the record before the trial court when it granted defendant's motion for summary [adjudication]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65), and that we ignore "documents filed subsequent to the trial court's resolution of the issue." (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 627; *Yanowitz, supra,* 36 Cal.4th at p. 1037; see also *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1074 [appellate court's independent review of summary judgment considers " 'only the facts properly before the trial court at the time it ruled on the motion' "].) This rule accords with the statutory directive that summary judgment shall be granted only "if all *the papers submitted* show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c), italics added; *Jacobs v. Retail Clerks Union, Local 1222* (1975) 49 Cal.App.3d 959, 966.) And, because we are to liberally construe the evidence presented in the light most favorable to plaintiff, resolving all evidentiary conflicts in his favor as the nonmoving party on summary adjudication (*Yanowitz*, at p. 1037), it is not relevant to our review that a jury apparently resolved *different* factual disputes in favor of Ferris on plaintiff's discrimination claim.[6]

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[6] Ferris has not cited, and we are not aware of, any authority holding a subsequent jury verdict on a different claim can be given issue preclusive effect in an appeal from a prior summary adjudication ruling in the same case. Because a "final judgment

Waller v. TJD, Inc. (1993) 12 Cal.App.4th 830 (*Waller*), upon which Ferris relies, does not compel a departure from the settled rule. The defendant in *Waller* appealed a judgment after a jury verdict in favor of the plaintiffs in an action for unpaid rent due under a lease. (*Id.* at pp. 831–832.) The defendant's sole

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on the merits" is a prerequisite to application of collateral estoppel, and a "judgment is not final and preclusive if it is still subject to direct attack" on appeal, it follows that the special verdict findings in this case cannot be given preclusive effect in an appeal attacking the judgment. (*People v. Burns* (2011) 198 Cal.App.4th 726, 731; see also *Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1185 ["The doctrine of res judicata fails because, as FTB observes, the first ruling was not in a *former* action [citations], a requirement which would also apply should we view the issue [as] one of 'collateral estoppel.' " (Italics added.)]; cf. 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334 ["Res judicata gives conclusive effect to a former judgment *only when the former judgment was in a different action*; an earlier ruling in the *same action* cannot be res judicata, although it may be 'law of the case' if an appellate court has determined the issue." (Italics added.)]; accord *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701–702; but see *In re Matthew C.* (1993) 6 Cal.4th 386, 393 ["If an [interlocutory] order is appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata."].)

In any event, as we explain below, the jury's special verdict findings on the discrimination claim do not preclude reversal of the summary adjudication ruling because plaintiff's retaliation claim presents a *different* factual issue concerning Lewis's motivation for discharging plaintiff. (See *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 387 ["doctrine of issue preclusion [is] applicable where issue in present proceeding is identical to one actually litigated and necessarily decided in prior proceeding"].)

contention was that the superior court had erred in denying its summary judgment motion. (*Id.* at p. 832.) In denying the motion, the superior court concluded a disputed factual issue existed as to whether the plaintiffs were entitled to unpaid rent under the lease. (*Ibid.*) Assuming for the sake of argument that the summary judgment ruling was erroneous, the *Waller* court held denial of the motion was not grounds for reversal of the judgment because the error did not prejudice the defendant. (*Id.* at p. 833.)

Addressing the defendants' argument that the claim would not have gone to trial had the superior court granted its summary judgment motion, the *Waller* court explained: "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*." (*Waller, supra,* 12 Cal.App.4th at p. 833.) Because the reviewing court was "enjoined to presume that the trial itself was fair and that the verdict in plaintiffs' favor was supported by the evidence," it could not "find that an erroneous pretrial ruling based on declarations and exhibits render[ed] the ultimate result unjust." (*Ibid.*) That conclusion, the *Waller* court emphasized, was "*limited* to situations in which a party moves for summary judgment on the ground that there is no triable issue of fact, *the motion is denied*, and the same questions raised by the motion are then decided adversely to the unsuccessful moving party after a trial on the merits which is itself free from prejudicial error." (*Id.* at p. 836, italics added.)

Plainly the circumstances of this case do not fit the "limited" situations in which the *Waller* holding might apply. Moreover, to the extent a broad principle can be gleaned from the *Waller* court's reasoning, it is simply that a moving party cannot demonstrate prejudice where a trial court *denies* a summary adjudication motion on the ground that triable issues exist, and a subsequent verdict confirms there were triable issues that the jury ultimately resolved in the nonmoving party's favor. (Cf. *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1269–1270, 1279 [distinguishing *Waller*, concluding denial of summary adjudication motion was prejudicial error, notwithstanding subsequent jury verdict in moving party's favor, where motion demonstrated claim was *legally barred* by a good faith settlement with a joint tortfeasor].) Here, plaintiff appeals a ruling *granting* summary adjudication on a retaliation claim that, while relying on the same evidence, could plausibly have resulted in a different verdict than the one rendered for Ferris on the discrimination claim. *Waller* is inapposite.

This brings us to Ferris's principal argument. Ferris contends Lewis's remark upon terminating plaintiff—that "it is very difficult to work with homosexuals"—referred to only plaintiff's "sexual orientation," and thus could not support a jury finding of "*retaliatory* animus." Ferris argues this is "particularly true since Mr. Lewis hired [plaintiff] for the second time, believing he was gay, and since [plaintiff] did not prevail on his discrimination claim." Contrary to Ferris's contention, we find the remark is reasonably susceptible of a retaliatory

interpretation, including one that can be reconciled with the jury's verdict on discrimination.

By special verdict, the jury found plaintiff's sexual orientation was not a substantial motivating reason for Ferris's decision to discharge plaintiff. Based on the summary judgment record, it is safe to assume there was sufficient evidence at trial to support that finding, including testimony regarding the confrontation with Castillo, the customer complaint, and, as Ferris notes, the fact that Lewis rehired plaintiff after learning of his sexual orientation. On the other hand, there was Lewis's remark suggesting he found it "difficult" to employ homosexuals. The jury apparently found the remark insufficient to prove Lewis was motivated by discriminatory animus, but this does not mean the jury necessarily would have rejected retaliation as a substantial motivating factor in the decision.

For example, a jury could find that, although Lewis was not himself prejudiced against homosexuals, he perceived that members of his painting crews were, and his remark reflected the view that it was "very difficult to work with homosexuals" because, like plaintiff, they could be targeted with harassment and complain about it, thus subjecting Lewis's small business to costs associated with remedying or preventing the harassment and potential litigation. (See, e.g., Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment* (1999) 19 Int'l Rev. L. & Econ. 421, 443 [discussing anomaly that "a law forbidding sexual harassment may not on balance benefit the protected group," because it "may make employers more

reluctant to hire women in jobs in which sexual harassment is likely"].)

Additionally, given the explanations offered by the other crewmembers, a jury could treat Lewis's remark as evidence that he did not take plaintiff's complaint seriously, that he believed Castillo was merely engaged in innocuous "name-calling," and that he concluded it was easier to terminate plaintiff than to deal with his complaints of sexual orientation harassment. (See *Iwekaogwu, supra,* 75 Cal.App.4th at pp. 816–817 [supervisor's comment in response to complaint of racial discrimination, indicating that "the only conduct he considered to rise to the level of discrimination was conduct such as that of the Ku Klux Klan, Neo Nazis and Skinheads," suggested he "did not take [plaintiff's] complaints seriously," and supported jury's finding of retaliatory animus]; see also Fremling & Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment* (1999) 147 U.Pa. L.Rev. 1069, 1095–1096 [suggesting the "effect of a sexual-harassment law on the relative propensity to hire men or women would depend on the [perceived] propensity of women to complain about real and imagined harassment"].) Under either view of the evidence, a jury could find Lewis was motivated by plaintiff's opposition to perceived workplace harassment, even while concluding Lewis did not fire plaintiff because of his sexual orientation. (See *Iwekaogwu,* at pp. 807, 813, 816–817 [affirming judgment after verdict finding retaliation, notwithstanding jury's inability to reach verdict on racial discrimination claim]; see also *Yanowitz, supra,* 36 Cal.4th at p. 1043 ["retaliation claim may be brought by an employee who has complained of or opposed

conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA"].)

Because plaintiff presented sufficient evidence of retaliatory animus, the trial court erred in concluding there was no triable issue of fact on the causal link element of plaintiff's retaliation claim.

3. *Plaintiff Cannot Demonstrate a Causal Link Between His Alleged Whistleblower Complaint to the EEOC and His Termination Because It Is Undisputed that Ferris Did Not Know of the Complaint*

On a motion for summary adjudication, "the pleadings 'delimit the scope of the issues' to be determined and '[t]he complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action.' " (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201–1202, fn. 5.) "Thus, a 'defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' [Citation.] 'To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion.' " (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.)

In his cause of action for violation of the workplace whistleblower statute, plaintiff alleged that he "reported

Employer's violations, and/or Plaintiff's good faith belief of Employer's violations, of laws and regulation *to the U.S. Equal Employment Opportunity Commission*," and "Employer subjected Plaintiff to adverse employment actions in retaliation for Plaintiff's protected activities, in violation of Labor Code [sections] 1102.5 [and] 1102.6." (Italics added.) In moving for summary adjudication of the claim, Ferris offered Lewis's declaration, attesting that he was "not aware of any communication or complaint by Plaintiff with any government entity, including . . . the Equal Employment Opportunity Commission," when Lewis made the decision to terminate plaintiff. Plaintiff did not present any evidence to dispute Lewis's declaration in opposing the summary adjudication motion.

On appeal, plaintiff emphasizes the whistleblower statute only requires the employee to report a statutory violation to "someone with authority over [his] job." (See Lab. Code, § 1102.5, subd. (b) ["An employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency, [or] to a person with authority over the employee . . . , if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute."].) Because the evidence showed he reported what he reasonably believed to be harassment in violation of FEHA *to Lewis*, plaintiff argues the "same facts raising a triable issue of FEHA retaliation raise a triable issue under [Labor Code section] 1102.5." However, that argument ignores the complaint's allegations premising the whistleblower claim on an alleged

report "to the U.S. Equal Employment Opportunity Commission," and the settled rule that "[t]he *pleadings* delimit the issues to be considered on a motion for summary judgment." (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 891, italics added.) Because the complaint did not allege Ferris violated the whistleblower statute by retaliating against plaintiff for his complaint *to Lewis*, and because it is undisputed that Lewis was unaware of plaintiff's alleged complaint to the EEOC when he decided to terminate plaintiff's employment, plaintiff cannot establish the causal link element of his whistleblower claim. (*Morgan, supra,* 88 Cal.App.4th at p. 70 [" 'Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.' "].) The trial court properly granted summary adjudication of the whistleblower claim.

DISPOSITION

The summary adjudication of the FEHA retaliation claim is reversed and the matter is remanded for further proceedings on the claim. The judgment is affirmed in all other respects. The parties shall bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

EPSTEIN, J.*

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* Retired Presiding Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.